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Supreme Court, U.S.
FILED

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No. OFFICE OF THE CLERK

In The

Supreme Court of the United States

October Term, 1995

STATE OF MONTANA,

Petitioner,

v.

JAMES ALLEN EGELHOFF,

Respondent.

On Petition For A Writ Of Certiorari To The Supreme Court Of The State Of Montana

PETITION FOR WRIT OF CERTIORARI

JOSEPH P. MAZUREK
Attorney General of Montana
PAMELA P. COLLINS
Assistant Attorney General
Counsel of Record
Justice Building
215 North Sanders
P.O. Box 201401
Helena, MT 59620-1401
(406) 444-2026

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
OR CALL COLLECT (402) 342-2831

53PP

QUESTION PRESENTED

Is a defendant deprived of his right to due process under the Fourteenth Amendment to the United States Constitution when a jury is instructed, pursuant to a state statute, that voluntary intoxication may not be taken into consideration in determining the existence of a mental state which is an element of the offense?

PARTIES TO THE PROCEEDING

The Petitioner in this Court is the State of Montana.

The Respondent in this Court is James Allen Egelhoff.

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OPINION BELOW

The opinion of the Montana Supreme Court is reported at 900 P.2d 260 (Mont. 1995). (App. 1a-26a.)

JURISDICTION

The state court opinion was filed on July 6, 1995. (App. 1a-26a.) Jurisdiction of this Court is invoked under 28 U.S.C. § 1257(a).

RELEVANT CONSTITUTIONAL AND STATUTORY PROVISIONS

U.S. Const. amend. XIV:

> [N]or shall any State deprive any person of life, liberty, or property, without due process of law
> . . . .

Mont. Code Ann. § 45-2-203 (1987):

> A person who is in an intoxicated condition is criminally responsible for his conduct and an intoxicated condition is not a defense to any offense and may not be taken into consideration in determining the existence of a mental state which is an element of the offense unless the defendant proves that he did not know that it

> was an intoxicating substance when he consumed, smoked, sniffed, injected, or otherwise ingested the substance causing the condition.

Mont. Code Ann. § 45-5-102(1)(a) (1987):

> A person commits the offense of deliberate homicide if: (a) he purposely or knowingly causes the death of another human being . . . .

STATEMENT OF THE CASE

Respondent James Allen Egelhoff was charged by information and convicted by a jury of two counts of deliberate homicide in violation of Mont. Code Ann. § 45-5-102 (1987) in the shooting deaths of Roberta Pavola and John Christianson. To convict on a charge of deliberate homicide, the State must prove as an element of the offense that the defendant acted "knowingly" or "purposely" in causing the death of another human being. (App. 28a, 29a.) Egelhoff was sentenced to 40 years in the Montana State Prison and two years for use of a firearm as to each count, to be served consecutively, for a total of 84 years.

At approximately midnight on July 12, 1992, the bodies of Roberta Pavola and John Christianson were found in the front seat of Christianson's station wagon, and Egelhoff was found in the rear cargo area, alive, intoxicated and yelling obscenities. Each victim died from a single gunshot wound to the head. Pavola had been shot in the left temple area and Christianson was shot in the right back side of his head. Egelhoff's gun was found on the floorboard near the brake pedal on the driver's

side with four loaded rounds and two empty casings. Forensics testing identified gunshot residue on Egelhoff's hands. Egelhoff voluntarily consumed alcoholic beverages on the day of the homicides to the extent that his blood alcohol level measured between .33 and .36 percent.

At trial, Egelhoff presented evidence regarding his intoxication, contending that his level of intoxication precluded him from undertaking the physical tasks necessary to have committed the homicides and asserting that an unidentified fourth person must have committed the crimes. He also claimed that he suffered from an alcohol-induced blackout which prevented him from recalling the events of the night in question.

The district court instructed the jury pursuant to Mont. Code Ann. § 45-2-203 (1987) as follows:

> A person who is in an intoxicated condition is criminally responsible for his conduct and an intoxicated condition is not a defense to any offense and may not be taken into consideration in determining the existence of a mental state which is an element of the offense unless the Defendant proves that he did not know that it was an intoxicating substance when he consumed the substance causing the condition.

(App. 29a.) Thus, the voluntary intoxication evidence was admissible, as offered, to show Egelhoff's physical inability to commit the crimes and to explain why he could not remember the events surrounding the crimes. However, pursuant to § 45-2-203, the evidence was not admissible on the issue of whether he "knowingly" or "purposely" committed the alleged crimes.

Egelhoff objected to the instruction on federal constitutional grounds at the time of settling jury instructions, arguing that Mont. Code Ann. § 45-2-203 was unconstitutional because it shifted the burden from the State to him with respect to the required mens rea by lowering the required mental state for those persons who are voluntarily intoxicated. (Tr. 1158-59.) Egelhoff made the same argument in his post-trial motion for a new trial.

The district court instructed the jury that the State retained the burden of proof, beyond a reasonable doubt, as to all the elements of the offenses, including the mental state requirement of having acted knowingly or purposely. (App. 30a.) The district court further instructed the jury that the State has the burden of proving guilt of the Defendant beyond a reasonable doubt and that the Defendant is presumed to be innocent of the charges against him. The jury was told that this presumption is not overcome unless, from all the evidence in the case, the jury is convinced beyond a reasonable doubt that the Defendant is guilty. It additionally was told the Defendant is not required to prove his innocence. (App. 27a-28a.)

Egelhoff appealed his conviction to the Montana Supreme Court, claiming that Mont. Code Ann. § 45-2-203 is unconstitutional because it has the effect of negating the requirement that the State prove a mental state which is an essential element of the offense charged, i.e., that the Defendant acted purposely or knowingly. Relying upon federal case law and the Due Process Clause of the Fourteenth Amendment to the United States

Constitution,[1] the Montana court declared § 45-2-203 unconstitutional and reversed the convictions. In doing so, the Montana Supreme Court stated that since the jury was not allowed to consider evidence of voluntary intoxication on the element of mental state, the State's burden of proof beyond a reasonable doubt on that element was reduced, in violation of the Court's ruling in *In re Winship*, 397 U.S. 358, 364 (1970). (App. 10a, 12a, 14a.) The Montana court cited *Chambers v. Mississippi*, 410 U.S. 284 (1973), in stating that, due to § 45-2-203, Egelhoff was denied the right to a fair opportunity to defend against the State's accusations (App. 12a). The state court also relied upon *Martin v. Ohio*, 480 U.S. 228 (1987), for the proposition that a court may not constitutionally disallow admission of evidence of voluntary intoxication during trial and consideration of that evidence by the jury in determining whether Egelhoff possessed the requisite intent. (App. 12a-14a.)

REASONS FOR GRANTING THE WRIT

The petition should be granted because the Montana Supreme Court decided a substantial federal question in conflict with the decisions of the highest courts of several

[1] The Montana court relied exclusively upon the Due Process Clause of the Fourteenth Amendment to the United States Constitution and federal case law interpreting that amendment. At no time in the opinion did the court refer to article II, section 17 of the Montana Constitution, which provides that "[n]o person shall be deprived of life, liberty, or property without due process of law."

other states; because the state court has decided an important question of federal law in a way that conflicts with applicable decisions of this Court; and because the state court has decided an important question of federal law which has not been, but should be, settled by this Court. The reasoning of the Montana Supreme Court not only differs markedly from that in *Winship*, *Chambers*, and *Martin*, the cases on which it relied, but also raises important questions regarding the constitutional power of the state legislature to make certain forms of evidence irrelevant to determining culpability for crimes.

I. The Constitutional Issue Has Been Resolved By Several Other State Courts of Last Resort Contrary to the Decision Below.

The Montana Supreme Court's decision conflicts with, inter alia, the Arizona Supreme Court's opinion in *State v. Ramos*, 648 P.2d 119 (Ariz. 1982). In *Ramos*, the defendant contended that the prosecution was unconstitutionally relieved of proving an element of the crime charged because the jury, under Ariz. Rev. Stat. Ann. § 13-503 (1980),[2] was prohibited from considering his

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[2] Ariz. Rev. Stat. Ann. § 13-503 (1980) disallowed the jury's consideration of voluntary intoxication evidence as to all mental states except "intentional" and provided:

> No act committed by a person while in a state of voluntary intoxication is less criminal by reason of his having been in such condition, but when the actual existence of the culpable mental state of intentionally or with the intent to is a necessary element to constitute any particular species or degree of offense, the jury may take into consideration the fact that the accused was intoxicated at the time in determining the culpable mental state with which he committed the act.

This section was amended, effective January 1994, to disallow the jury's consideration of voluntary intoxication evidence for all mental states, including offenses where the requisite mental state is "intentional." The 1993 amendment provides as follows:

> Temporary intoxication resulting from the voluntary ingestion, consumption, inhalation or injection of alcohol, an illegal substance under 34 of this title or other psychoactive substances or the abuse of prescribed medications does not constitute insanity and is not a defense for any criminal act or requisite state of mind.

intoxication to determine whether he committed the crime "knowingly." The Arizona Supreme Court disagreed, concluding that the statute did not relieve the state of the ultimate burden of persuasion. Relying on *Powell v. Texas*, 392 U.S. 514, 535-36 (1968), the Arizona Court reasoned that the state legislature has wide latitude in promulgating state substantive law and that the United States Constitution reserves to the states considerable freedom in defining crimes, including the mental states involved, and in establishing penalties for the crimes defined. The Arizona Court also noted that relevant evidence may sometimes be excluded for reasons of policy and that public policy dictates that one who voluntarily seeks the influence of alcohol should not be insulated from criminal responsibility. *Accord State v. Gallegos*, 870 P.2d 1097 (Ariz.), *cert. denied*, 115 S. Ct. 330 (1994); *State v. Schurz*, 859 P.2d 156 (Ariz. 1993).

The Montana Supreme Court's decision also conflicts with *Wyant v. State*, 519 A.2d 649 (Del. 1986). In that decision, the Delaware Supreme Court concluded that Del. Code Ann. tit. 11, § 421 (1976)[3] renders irrelevant and inadmissible any testimony regarding the effect of a defendant's intoxication on the issues of intent and proof of the required state of mind for conviction of the charged offenses. The Delaware Supreme Court declared that § 421 is constitutional since it does not deprive the defendant of due process or impermissibly relieve the state of its burden of proof of the defendant's intent to commit the crimes charged. The Delaware Court remarked that the defendant received the process constitutionally due him within the definitions of acceptable social conduct imposed by the will of the people through the legislature. *Accord Davis v. State*, 522 A.2d 342 (Del. 1987).

The decision of the Montana Supreme Court is also in conflict with the Hawaii Supreme Court's decision in *State v. Souza*, 813 P.2d 1384 (1991). In *Souza*, the Hawaii Court held that Haw. Rev. Stat. § 702-230 (1986), which provides that evidence of self-induced intoxication of a defendant is not admissible to negative the state of mind sufficient to establish an element of the offense, is constitutional. The Hawaii Court stated that the statute does not deprive the defendant of the right to present a defense, nor does the statute relieve the state of the

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[3] Del. Code Ann. tit. 11, § 421 (1976) provides:

> The fact that a criminal act was committed while the person committing such act was in a state of intoxication, or was committed because of such intoxication, is no defense to any criminal charge if the intoxication was voluntary.

burden of establishing that a defendant had the requisite mens rea.

The Montana Supreme Court's decision also conflicts with the Missouri Supreme Court's decision in *State v. Erwin*, 848 S.W.2d 476 (Mo. 1993), *cert. denied*, 114 S. Ct. 88 (1994), where the court held that Mo. Rev. Stat. § 562.076 (1983),[4] which provides that the jury may not consider voluntary intoxication on the issue of the defendant's mental state, does not violate due process since the exclusion of voluntary intoxication evidence in no way relieves the state of its burden of proving all elements of the offense, including mental state, beyond a reasonable doubt.

Thus, the highest courts of at least four states have held that a defendant's federal constitutional right to due process is not violated when a jury is precluded from considering evidence of voluntary intoxication in determining whether the defendant possessed the requisite mental state. The Montana decision below, which holds to the contrary, stands alone.

The Montana Supreme Court's opinion further conflicts with the decisions of several highest state courts which have held that it is not a denial of due process to preclude the jury from considering evidence of voluntary intoxication on the issue of the defendant's ability to form

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[4] Mo. Rev. Stat. § 562.076 (1983) provides in relevant part:

> Evidence that a person was in a voluntarily intoxicated or drugged condition may be admissible when otherwise relevant on issues of conduct but in no event shall it be admissible for the purpose of negating a mental state which is an element of the offense.

the requisite mental state when the offense charged requires a general, as opposed to a specific, intent. *People v. DelGuidice*, 606 P.2d 840 (Colo. 1980). *Accord Bieber v. People*, 856 P.2d 811 (Colo. 1993). In sum, the decision of the Montana Supreme Court conflicts with the practice of a vast majority of the states which limit to some degree the use of voluntary intoxication evidence.[5]

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[5] The Montana Court's holding also conflicts with the decisions of lower state courts. In *Pharo v. State*, 783 S.W.2d 64 (Ark. Ct. App. 1990), an Arkansas intermediate court held that the trial court properly refused to admit evidence of voluntary intoxication to negate the existence of a specific element of a crime. Citing *In re Winship*, Pharo argued that the exclusion of such evidence that would tend to negate the specific intent requirement deprived him of due process because the state was effectively relieved of its burden of proving the mental state element beyond a reasonable doubt. The court rejected this argument and stated that the Arkansas Supreme Court opinion in *White v. Arkansas*, 717 S.W.2d 784 (Ark. 1986), effectively held that voluntary intoxication is no longer available as a defense or admissible for the purpose of negating specific intent. *Accord Cox v. State*, 808 S.W.2d 306, 313 (Ark. 1991). In *Commonwealth v. Rumsey*, 454 A.2d 1121 (Pa. Super. Ct. 1983), a Pennsylvania intermediate court held that 18 Pa. Cons. Stat. Ann. § 308 (1976), which provides that evidence of voluntary intoxication may not be introduced to negate the element of intent of the offense except when it is relevant to reduce murder from a higher to a lower degree of murder, is constitutional. The Pennsylvania court stated that § 308, in effect, redefined the mens rea element of intentional or knowing crimes in cases where the defendant was voluntarily intoxicated. This was permissible, the court stated, under *Powell v. Texas*.

II. Contrary to the Decision Below, the Due Process Clause Does Not Restrict a State Legislature's Authority to Render Evidence of Voluntary Intoxication Irrelevant as a Matter of Law in Determining Mental State.

The Montana Supreme Court relied on this Court's decisions in *Winship*, *Chambers*, and *Martin* to declare Mont. Code Ann. § 45-2-203 unconstitutional. On the contrary, the Montana legislature's decision, based on valid policy reasons, to render evidence of voluntary intoxication irrelevant as a matter of law in determining mental state violates no constitutional principles.

Nothing in the Constitution precludes the states from utilizing the criminal sanction in an effort to deter voluntary intoxication and the results it may cause, *Powell v. Texas*, 392 U.S. 514, 530-31 (1968), even if responsibility is imposed without any finding of moral culpability toward the resulting harm. 392 U.S. at 544-45 (Black, J., concurring).[6] The wide constitutional latitude available to the states in this regard is apparent in the vast disparity among them in treating voluntary intoxication as a defense. *See* 1 Paul H. Robinson, *Criminal Law Defenses* § 65(a), at 289-93 (1984) (1995 Suppl. at 43-45).[7]

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[6] The Court remarked in *Powell*, 392 U.S. at 536, "The doctrines of . . . mens rea . . . have historically provided the tools for a constantly shifting adjustment of the tension between the evolving aims of the criminal law and changing religious, moral, philosophical, and medical views of the nature of man. This process of adjustment has always been thought to be the province of the States."

[7] Several state courts have held that the legislature may constitutionally redefine the mens rea element of crimes to

At common law, voluntary intoxication was not a defense in a criminal prosecution, even though the intoxication may have precluded a defendant from understanding his actions, having the required culpable mental state, or remembering the events. *See United States ex rel. Goddard v. Vaughn*, 614 F.2d 929, 934-35 and nn.5-7 (3d Cir.), *cert. denied*, 449 U.S. 844 (1980); *State v. Richardson*, 495 S.W.2d 435, 440 (Mo. 1973); *State v. Stacy*, 160 A. 257, 268 (Vt. 1932). During the last century, the courts, in an effort to mitigate the common law rule concerning voluntary intoxication, crafted a new rule. Evidence of voluntary intoxication was to be admissible to negate the required mental state in "specific intent" crimes, but was inadmissible where the charged offense only required "general intent." *Commonwealth v. Rumsey*, 454 A.2d at 1123. *See generally* Hall, *Intoxication and Criminal Responsibility*, 57 Harv. L. Rev. 1045, 1046-49 (1944); Paulsen, *Intoxication as a Defense to Crime*, 1961 U. Ill. L.F. 1, 10-11.

As the courts struggled with determining whether a particular crime was one involving "specific" or "general" intent, it became apparent that the dividing line was based not so much on an inquiry of what subjective state of mind was required for each offense, but rather on matters of policy concerning what criminal responsibility should be borne by intoxicated offenders. *People v. Rocha*, 479 P.2d 372, 375-76 (Cal. 1971); *People v. Hood*, 462 P.2d 370, 377-79 (Cal. 1969). Generally, those crimes defined as requiring specific intent were those in which negation

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exclude evidence of voluntary intoxication to negate state of mind. *See State v. Souza*, 813 P.2d at 1385; *Wyant v. State*, 519 A.2d at 660; *Commonwealth v. Rumsey*, 454 A.2d at 1122.

due to intoxication would not result in total acquittal, but only lead to the offender's responsibility being lowered to a lesser crime. The "specific intent, general intent" dichotomy was severely criticized as creating artificial distinctions between criminal intents; as being elusive in definitions; and as leading to inconsistent results, *see, e.g.*, Hall, 57 Harv. L. Rev. at 1064; note, *Alcohol Abuse and the Law*, 94 Harv. L. Rev. 1660, 1684 (1981).[8]

If a state can constitutionally limit the application of voluntary intoxication as a defense[9] and the use of such evidence with respect to certain crimes, there is no reasoned basis to conclude that a state cannot take the next step and preclude the defendant from relying on it to negative the existence of the required mental state.[10] That some states have chosen to retain voluntary intoxication

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[8] Since Montana revamped its criminal statutes in 1973, borrowing concepts of mens rea from the Model Penal Code, specific intent need not be shown unless the statute defining the offense requires a specific purpose as an element thereof. *State v. Starr*, 664 P.2d 893, 897 (Mont. 1983). Deliberate homicide, the offense with which Egelhoff was charged and convicted, is not one of these "dual intent" crimes.

[9] A federal court of appeals has held that the defense of voluntary intoxication "was not required either constitutionally or at common law." *United States ex rel. Goddard v. Vaughn*, 614 F.2d 929, 935 (3d Cir. 1980).

[10] The Montana Supreme Court's reliance on *Martin* on this issue is misplaced, since the constitutional issue presented by § 45-2-203 differs markedly from that in *Martin*. *Martin* involved the question whether a state could require a defendant to shoulder the burden of showing self-defense when treated as an affirmative defense, not the question whether a legislature constitutionally may render evidence of voluntary intoxication irrelevant as a matter of law in determining mental state.

as a defense, or to admit such evidence to negative intent, does not make constitutionally infirm a more restrictive approach or rule. *See Martin*, 480 U.S. at 236; *McMillan v. Pennsylvania*, 477 U.S. 79, 90 (1986).

The Montana Supreme Court's reliance on *Chambers* is also misplaced. Citing *Chambers*, the court declared that disallowing the jury to consider evidence of Egelhoff's voluntary intoxication as to his mental state, pursuant to § 45-2-203, infringed upon his federal due process right to present a defense (App. 12a). Clearly, the Due Process Clause does not guarantee the accused the right to present any and all evidence to the trier of fact. For example, "the accused does not have an unfettered right to offer testimony that is incompetent, privileged, or otherwise inadmissible under standard rules of evidence." *Taylor v. Illinois*, 484 U.S. 400, 410 (1988); *Patterson v. New York*, 432 U.S. 197, 208-09 (1977) (state not required to recognize extreme emotional disturbance as a defense to murder). *See also* Fed. R. Evid. 403. Further, as discussed above, the Constitution does not demand that the state create a defense of voluntary intoxication.

The Montana court erroneously relied on *In re Winship* when it declared that Egelhoff's due process rights were violated when the jury was precluded from considering evidence of voluntary intoxication on the issue of mental state, since the State was thus relieved of part of its burden to prove beyond a reasonable doubt every element of the crime. (App. 12a, 14a.) As the Colorado Supreme Court stated in *People v. DelGuidice*, 606 P.2d at 843, authorities such as *Winship* do not decide this issue, but rather reaffirm the principle that the prosecution must adhere to the "beyond a reasonable doubt" standard

of proof, rather than a lesser standard, in overcoming the presumption of innocence of the accused in a criminal trial. *Winship* itself establishes the requirement of proof beyond a reasonable doubt with specific reference to the context of historical rules of evidence:

> [G]uilt in a criminal case must be proved beyond a reasonable doubt and by evidence confined to that which long experience in the common-law tradition, to some extent embodied in the Constitution, has crystallized into rules of evidence consistent with that standard.

397 U.S. at 362. The principle established in *Winship* cannot be syllogistically applied in a manner which abrogates the policy choices inherent in the rule precluding the jury from considering evidence of voluntary intoxication as to the defendant's mental state.

The Due Process Clause does not require the law to disregard an actor's culpability in causing the conditions he offers as a defense. A contrary conclusion, like that reached below, improperly ignores the critical fact that the defendant voluntarily caused his own intoxication and he should not be permitted to benefit from his own folly in becoming intoxicated. Such a conclusion transgresses the principle of personal responsibility forming the bedrock of all law. It also ignores evidentiary difficulties encountered in proving the mental state of an intoxicated defendant and the serious harms that such a lax attitude regarding voluntary intoxication may generate. Recognizing that alcohol and drug intoxication are factors involved in a large majority of egregious crimes, several state legislatures have concluded that allowing intoxication evidence on the issue of mental state runs the

unacceptable risk of potential manipulation by defendants and will lead to confusion of the jury who may not adequately appreciate that intoxication evidence is to be utilized only for the culpability inquiry, not for purposes of showing an excuse. The Montana Supreme Court's decision fails to recognize these commonsense policy considerations and warrants review.

CONCLUSION

The Petitioner respectfully requests that the petition for certiorari be granted.

JOSEPH P. MAZUREK
Attorney General of Montana
PAMELA P. COLLINS
Assistant Attorney General
Counsel of Record
Justice Building
215 North Sanders
P.O. Box 201401
Helena, MT 59620-1401
(406) 444-2026

October 1995

No. 93-405

IN THE SUPREME COURT OF THE
STATE OF MONTANA

1995

STATE OF MONTANA,

Plaintiff and Respondent,

-v-

JAMES ALLEN EGELHOFF,

Defendant and Appellant

(Filed July 6, 1995)

APPEAL FROM: District Court of the Nineteenth Judicial District, In and for the County of Lincoln, The Honorable Robert S. Keller, Judge presiding.

COUNSEL OF RECORD:

For Appellant:

Ann C. German, Libby, Montana; Amy Guth, Lincoln County Public Defender, Libby, Montana

For Respondent:

Hon. Joseph P. Mazurek, Attorney General, Pamela P. Collins, Assistant Attorney General, Helena, Montana; Scott B. Spencer, Lincoln County Attorney, Libby, Montana

Heard: October 27, 1994
Submitted: February 23, 1995
Decided: July 6, 1995

Filed:

/s/ Ed Smith
Clerk

Justice Fred J. Weber delivered the Opinion of the Court.

James Allen Egelhoff (Egelhoff) appeals his conviction in the District Court of the Nineteenth Judicial District, Lincoln County, on two counts of deliberate homicide for the shooting deaths of his two companions following a day of drinking. Egelhoff was sentenced to forty years on each count and an additional two-year term for use of a weapon on each count, a total of eighty-four years, to run consecutively. The District Court also designated him as a dangerous offender for parole purposes. We reverse and remand.

The following issues are presented on appeal:

I. Was Egelhoff denied due process by a jury instruction that voluntary intoxication may not be taken into consideration in determining the existence of a mental state which is an element of the offense?

II. Did the District Court err in permitting a lay witness to give opinion testimony?

III. Are the jury verdicts finding Egelhoff guilty of two counts of deliberate homicide supported by substantial evidence?

IV. Did the District Court err in designating Egelhoff a dangerous offender for purposes of parole?

We conclude that Issue I is dispositive.

Egelhoff was convicted by a jury of two counts of deliberate homicide for the July 12, 1992 shooting deaths of Roberta Pavola (Pavola) and John Christianson (Christianson). At approximately midnight on July 12, 1992, their bodies were found in the front seat of the station wagon belonging to Christianson and Egelhoff was found in the rear cargo area, alive but intoxicated.

Egelhoff and a friend from Helena went to the Yaak area near Troy to pick mushrooms in early July 1992. Egelhoff had no transportation and no personal effects apart from some clothing and a .38 caliber handgun which he kept in a holster on his right hip.

Pavola and Christianson, also in the Yaak area to pick mushrooms, camped in an area near the place where they picked mushrooms. Egelhoff and his companion camped in the same area as Christianson and Pavola and became acquainted with them. Egelhoff's companion departed prior to the day Pavola and Christianson were killed.

Egelhoff, Pavola and Christianson sold their mushrooms on Sunday, July 12, 1992 and then bought beer and went to a party at a Troy apartment. They spent most of the day drinking at the party and in bars. The trio left the party sometime after 9:00 p.m. in Christianson's station wagon with Christianson driving, Pavola in the front passenger seat and Egelhoff in the rear.

Much of what occurred after they left the party that evening is unknown. Testimony at trial indicated that

Egelhoff and Christianson were seen in an IGA grocery store at approximately 9:20 p.m. and that Christianson's station wagon was seen being driven in an erratic manner on Highway 2 west of Troy a while later. Christianson's vehicle was also observed going off the road into a ditch several times. Law enforcement officers later located five places in the area where a vehicle had gone off the highway.

Numerous witnesses testified about their observations during this period of time. Two of the witnesses who observed the Christianson vehicle reported a possible drunken driver to the Lincoln County Sheriff's department shortly before midnight. When the station wagon came to its final stop and the sheriff's officers arrived, it was situated in a ditch, Pavola and Christianson were dead and Egelhoff was yelling obscenities from the rear of the vehicle.

Both Pavola and Christianson died from gunshot wounds. Pavola had been shot in the left temple area and Christianson was shot in the right back side of his head. Pavola's body remained in the passenger seat near the window and Christianson's body was found in the middle of the front seat close to Pavola with his legs on the floorboards in front of the passenger's seat and Pavola's upper body slumped over his legs. Egelhoff's gun was found on the floorboard near the brake pedal on the driver's side and Egelhoff was in the back of the station wagon where the back seat had been laid flat. Egelhoff's revolver was found with four loaded rounds and two empty casings. Egelhoff was lying on his right side with his head towards the back of the cargo area.

Detective Clint Gassett responded to a call about 1:00 a.m. on July 13, 1992, and came to the Libby hospital where Egelhoff had been brought by officers. He testified that Egelhoff was intoxicated, combative and cursing profusely. Detective Gassett, another officer and others attempted to physically restrain Egelhoff by holding him down on the table by his arms and chest. Detective Gassett testified that Egelhoff continued to act wildly during the five to six hours Gassett was at the hospital. Egelhoff would calm down at times only to repeatedly flare up again.

According to the testimony of Detective Gassett, at one point when another detective was preparing to take Egelhoff's photograph, Egelhoff looked directly at the detective, pulled his leg back and kicked the camera out of the detective's hands with the flat of his foot, knocking the camera to the floor. Detective Donald Bernall testified that he thought Egelhoff's coordination was good and he was surprised to learn that Egelhoff's blood alcohol content was .36 percent.

Egelhoff testified that he did not remember much of what happened on the evening of July 12, 1992, his last memory being that he was at the party at the Troy apartment and that the sun had not gone down. He testified he did not remember leaving the party, being in the station wagon, shooting the gun, or kicking Detective Bernall at the hospital. He further testified he remembered that at one point in the evening the station wagon was parked somewhere, and he and Christianson were sitting on a hill or a bank passing a bottle of Black Velvet back and forth between them. He had no recollection of Pavola being with them at that time.

Forensics testing identified gunshot residue on Egelhoff's hands. The bullet that killed Pavola entered her head at the left temple, exited the right back side of her head and was never found. Testimony by the State's firearms examiner indicated that the bullet which killed Christianson could have come from thousands of guns with characteristics like Egelhoff's gun.

At trial, Egelhoff contended that because he had been found unconscious and suffering from intoxication measured at .36 one hour after being brought to the hospital, his level of intoxication precluded him from having driven the car or undertaking the physical tasks necessary to have done what the prosecution claimed he had done. He contended that he suffered from an alcohol-induced amnesia (blackout) which prevented him from recalling the events of the night in question.

When ambulance attendants came to take him to the hospital, Egelhoff kept asking questions like, "Did you find him?" When he sobered up the next day, Egelhoff did not recall asking the questions or to whom he may have been referring when he asked them. Part of Egelhoff's theory which he presented at trial was that there was a fourth person in the car who had disappeared before officers arrived at the scene of the accident.

Dr. Clyde Knecht, a medical doctor who practiced in Libby, examined Egelhoff in the emergency room at the Libby hospital in the early morning hours of July 13, 1992. He testified that Egelhoff, judging from his blood alcohol level and his behavior, probably suffered from alcoholic "blackout" at some point in time and for some

period of time prior to the time of Dr. Knecht's examination. He also testified that an intoxicated person experiencing such a blackout may walk, talk, and fully function, with people around the person unable to tell that the person experienced a blackout.

A jury found Egelhoff guilty of two counts of deliberate homicide for the deaths of Christianson and Pavola. Because defendant is granted a new trial as a result of our reversal of his conviction as discussed below, we decline to address the remaining issues raised by Egelhoff.

I

Was Egelhoff deprived of due process when the District Court instructed the jury that voluntary intoxication may not be taken into consideration in determining the existence of a mental state which is an element of the offense of deliberate homicide?

Although Egelhoff raised four issues on appeal, oral argument was granted only on this issue concerning the constitutional validity of the 1987 amendment to § 45-2-203, MCA, regarding consideration by the jury of evidence of intoxication in criminal trials. Egelhoff voluntarily consumed alcoholic beverages on the day of the homicides to the extent that his blood alcohol level measured at least .33% and possibly .36%.

The District Court gave the following instruction to the jury containing statutory language from § 45-2-203, MCA, referring to voluntary intoxication:

INSTRUCTION NO. 11

A person who is in an intoxicated condition is criminally responsible for his conduct and an intoxicated condition is not a defense to any offense and may not be taken into consideration in determining the existence of a mental state which is an element of the offense unless the Defendant proves that he did not know that it was an intoxicating substance when he consumed the substance causing the condition.

We first address the State's argument that Egelhoff did not object to Instruction No. 11 on the ground now asserted. Egelhoff objected to Instruction No. 11 for several reasons, including constitutional reasons. Egelhoff's counsel objected to the instruction at the time of settling jury instructions. At that time, she claimed that § 45-2-203, MCA, is unconstitutional because it has the effect of negating the requirement that the State prove a mental state when proving deliberate homicide where the defendant is voluntarily intoxicated. She also argued that § 45-2-203, MCA, is unconstitutional because it shifts the burden of proof on the element of mental state from the prosecution to the defendant. In addition to making these objections during the trial, Egelhoff's counsel also made the same arguments and explained them in greater detail in her post-trial motion for a new trial. We conclude from our review of the record that Egelhoff's counsel properly objected to the giving of this instruction.

Egelhoff was convicted of two counts of deliberate homicide. To convict on a charge of deliberate homicide, the State must prove as an element of the offense that the defendant acted "knowingly" or "purposely" in causing

the death of another human being. Section 45-5-102, MCA. Egelhoff claimed § 45-2-203, MCA, is unconstitutional because it deprives defendants of due process by removing from the jury's consideration facts relevant to a determination of mental state, an essential element of the offense to be proven beyond a reasonable doubt by the State.

Section 45-2-203, MCA, as amended in 1987, provides:

> **45-2-203. Responsibility – intoxicated condition.** A person who is in an intoxicated condition is criminally responsible for his conduct and *an intoxicated condition is not a defense to any offense and may not be taken into consideration in determining the existence of a mental state which is an element of the offense* unless the defendant proves that he did not know that it was an intoxicating substance when he consumed, smoked, sniffed, injected, or otherwise ingested the substance causing the condition. (Emphasis supplied.)

In 1985, § 45-2-203, MCA, provided:

> **45-2-203. Responsibility – intoxicated or drugged condition.** A person who is in an intoxicated or drugged condition is criminally responsible for conduct unless such condition is involuntarily produced and deprives him of his capacity to appreciate the criminality of his conduct or to conform his conduct to the requirements of law. *An intoxicated or drugged condition may be taken into consideration in determination of the existence of a mental state which is an element or the offense.* (Emphasis supplied.)

Egelhoff does not contend that he has the right to the affirmative defense of voluntary intoxication. He challenges only the exclusion of evidence from the jury's deliberations for purposes of determining mental state (the 1987 amendment). Egelhoff contends that Instruction No. 11, containing the statutory language from § 45-2-203, MCA, removed evidence of alcohol intoxication from the jury's consideration in determining whether he acted "knowingly" or "purposely" and relieved the prosecution of its burden to prove the required mental state for deliberate homicide, which is constitutionally impermissible.

The State contends that Egelhoff was not prejudiced because he was allowed to use the evidence of intoxication in order to explain his inability to remember the events of the evening as being the result of an alcohol-induced "blackout" and also as evidence of his lack of physical coordination which would have made it impossible for him to have driven Christianson's station wagon the night of the homicides. The State also argues that Egelhoff was not deprived of due process because the court also instructed the jury that the State had the burden of proving all elements of the offense beyond a reasonable doubt.

It is well established that in order to afford a defendant due process under the Fourteenth Amendment of the United States Constitution, the State must prove every element of the offense beyond a reasonable doubt. *See* In Re Winship (1970), 397 U.S. 358, 364, 90 S.Ct. 1068, 1072, 25 L.Ed.2d 368, 375. In addition, Sandstrom v. Montana (1979), 442 U.S. 510, 524, 99 S.Ct. 2450, 2459, 61 L.Ed.2d 39, 51, held that an instruction which shifted the burden of proof on the element of mental state to the

defendant is unconstitutional. In *Sandstrom*, the burden shifting resulted from instructing the jury that "[t]he law presumes that a person intends the ordinary consequences of his voluntary acts." The *Sandstrom* presumption was a rebuttable presumption.

Engelhoff argues that in *Sandstrom* the defendant was at least allowed the opportunity to rebut the presumption. He contends he is denied that opportunity because the instruction prohibits consideration of his intoxication in determining whether he acted knowingly and purposely. Egelhoff also contends that Morissette v. United States (1951), 342 U.S. 246, 72 S.Ct. 240, 96 L.Ed. 288, supports his arguments because the United States Supreme Court there condemned a process by which a defendant could be convicted of criminal intent without proof by the government, which was determined to be inconsistent with our philosophy of criminal law.

Our concern here is with proof of the mental state element of the offense of deliberate homicide. The evidence presented at trial established that Egelhoff had a level of intoxication measured at .36. It is clear that such evidence was relevant to the issue of whether Egelhoff acted knowingly and purposely; yet Instruction No. 11 precluded the jury from considering it for that purpose.

The prosecution presented a great deal of evidence which reflected on Egelhoff's ability to shoot Pavola and Christianson despite his level of intoxication. That evidence included the following: In order to commit the crimes, he had to take the gun from the glove compartment of the vehicle. He made an attempt to flee after he went into the ditch. He tried to avoid detection when

Rebecca Garrison tried to approach the car. Ms. Garrison noticed a stick which she assumed must have been used by Egelhoff to depress the accelerator so that Egelhoff could drive from the back seat. He could talk. At the IGA store at 9:20 p.m., Egelhoff spoke well and did not slur his words. He later told Ms. Garrison to "stay away" and he talked to the ambulance driver. He had physical energy and strength. He tried to avoid detection by another of the witnesses who had stopped to give assistance. Detective Bernall testified that his coordination was good as was demonstrated by his kicking of the camera. The evidence was presented by the State to establish that Egelhoff acted "purposely" or "knowingly." Such evidence could be properly considered by the jury in its determination of whether or not he acted "purposely" or "knowingly."

However, Egelhoff was not allowed to rebut such evidence with evidence that his level of intoxication precluded him from forming the requisite mental state. As a result of the elimination of the opportunity of using this rebuttal evidence, the prosecution's burden of proof for the element of mental state was reduced.

This is a denial of due process. Due process is "the right to a fair opportunity to defend against the State's accusations." Chambers v. Mississippi (1973), 410 U.S. 284, 294, 93 S.Ct. 1038, 1045, 35 L.Ed.2d 297, 308. This right to present a defense is fundamental. *Chambers*, 410 U.S. at 302, 93 S.Ct. at 1049, 35 L.Ed.2d at 312. In Martin v. Ohio (1987), 480 U.S. 228, 233, 107 S.Ct. 1098, 1101, 94 L.Ed.2d 267, 274, the United States Supreme Court upheld a conviction of murder where the defendant attempted to prove self defense. The Supreme Court held

it was not a violation of due process to place the burden of proving self defense on a defendant charged with committing aggravated murder. The Court in *Martin* emphasized that the defendant had the opportunity under the law and instructions to justify the killing by showing herself blameless because she acted in self defense. As a part of that discussion the *Martin* Court then stated:

> It would be quite different if the jury had been instructed that self-defense evidence could not be considered in determining whether there was a reasonable doubt about the State's case, *i.e.*, that self-defense evidence must be put aside for all purposes unless it satisfied the preponderance standard. Such instruction would relieve the State of its burden and plainly run afoul of *Winship's* mandate. 397 U.S., at 364. The instructions in this case could be clearer in this respect, but when read as a whole, we think they are adequate to convey to the jury that all of the evidence, including the evidence going to self-defense, must be considered in deciding whether there was a reasonable doubt about the sufficiency of the State's proof of the elements of the crime.
>
> . . .
>
> When the prosecution has made out a prima facie case and survives a motion to acquit, the jury may nevertheless not convict if the evidence offered by the defendant raises any reasonable doubt about the existence of any fact necessary for the finding of guilt. Evidence creating a reasonable doubt could easily fall far short of proving self-defense by a preponderance of the evidence. . . .

Martin, 480 U.S. at 233-34, 107 S.Ct. at 274-75, 94 L.Ed.2d at 1102. While the above statement may not have been essential to the holding of the Court, it emphasizes a clear distinction between placing a burden upon a defendant to prove a specific aspect of her defense, in this case self defense, and instructing a jury that self defense evidence *could not be considered* in determining whether there was a reasonable doubt as to her guilt. The analysis is clearly applicable to our present case. While Egelhoff was given the opportunity to present evidence of his level of intoxication, the instruction prevented consideration by the jury as it decided whether or not there was a reasonable doubt as to Egelhoff's acting "knowingly" and "purposely." Because the jury was not allowed to consider that evidence for such a purpose, the State was relieved of part of its burden to prove beyond a reasonable doubt every fact necessary to constitute the crime charged. It was reversible error to instruct the jury not to consider it.

By allowing the jury to consider such evidence, we permit the jury to make its decision on all of the relevant evidence as required under *Martin*. By instructing the jury that it may not consider intoxication evidence for purposes of determining a mental state of "knowingly" or "purposely," the jury may be misled into believing the State has proved the mental state beyond a reasonable doubt and that is why defendant cannot introduce evidence in opposition to a specific state of mind. The State should never escape its burden of proof of each element of the offense.

Egelhoff's argument focuses on "burden shifting" which is not technically what happens in a case such as the present one. The burden is not shifted but rather it is

lessened because the defendant is precluded from presenting arguments concerning the prosecution's "failure of proof" of the subjective mental state element required for conviction of a crime which includes the mental state of acting "knowingly" or "purposely."

Similar arguments were presented in State v. Byers (1993), 261 Mont. 17, 41-41, 861 P.2d 860, 875. There are significant factual differences between *Byers* and the present case, because Byers did not rely upon intoxication as an element of his defense and because there was no question in *Byers* that he had committed the two homicides, whereas in the present case Egelhoff relies on the intoxication defense as part of his argument and the basic issue was whether or not he actually committed the homicides.

In *Byers* the holding was that the district court did not commit reversible error by instructing the jury that voluntary intoxication is not a defense to criminal activity. Our holding in the present case does not conflict with the express holding in *Byers*. In *Byers* we did state that the intoxication instruction which was identical to that in the present case did not relieve the State of its burden of proving beyond a reasonable doubt all of the elements of the offense. In making that statement, although it was dicta, we were not correct as appears from our foregoing analysis. We overrule any of the statements made in *Byers* to the extent that it indicates it is constitutional to instruct that an intoxicated condition may not be taken into consideration in determining the existence of a mental state which is an element of the offense.

We conclude that the defendant had a due process right to present and have considered by the jury all relevant evidence to rebut the State's evidence on all elements of the offense charged. We conclude that the following portion of § 45-2-203, MCA (1993), is a violation of due process and is therefore unconstitutional:

> [an intoxicated condition] . . . may not be taken into consideration in determining the existence of a mental state which is an element of the offense . . .

We hold Egelhoff was denied due process when the jury was instructed that voluntary intoxication may not be taken into consideration in determining the existence of a mental state which is an element of the offense.

For the benefit of the bench and bar of Montana, we briefly discuss the extent to which the holding of this decision has application to other cases. In a criminal case we have noted that, at a minimum, all "new" rules of constitutional law must be applied to cases still subject to direct review at the time the "new" decision is handed down. State, City of Bozeman v. Peterson (1987), 227 Mont. 418, 420, 739 P.2d 958, 960, citing Shea v. Louisiana (1985), 470 U.S. 51, 57, 105 S.Ct. 1065, 1069, 84 L.Ed.2d 38, 45.

The United States Supreme Court has refined its position since we decided *Peterson*, stating as follows:

> We therefore hold that a new rule for the conduct of criminal prosecutions is to be applied retroactively to all cases, state or federal, pending on direct review or not yet final[.]

Griffith v. Kentucky (1987), 479 U.S. 314, 328, 107 S.Ct. 709, 716, 93 L.Ed.2d 649, 661. We conclude that the foregoing rule is binding upon this Court.

With regard to the question of retroactivity, the United States Supreme Court has additionally made its position more clear and we find this also to be binding upon us:

> Retroactivity is properly treated as a threshold question, for, once a new rule is applied to the defendant in the case announcing the rule, even-handed justice requires that it be applied retroactively to all who are similarly situated. . . .
>
> It is admittedly often difficult to determine when a case announces a new rule, and we do not attempt to define the spectrum of what may or may not constitute a new rule for retroactivity purposes. In general, however, a case announces a new rule when it breaks new ground or imposes a new obligation on the States or the Federal Government. To put it differently, a case announces a new rule if the result was not *dictated* by precedent existing at the time the defendant's conviction became final. [Citations omitted.]

Teague v. Lane (1989), 489 U.S. 288, 300-01, 109 S.Ct. 1060, 1070, 103 L.Ed.2d 334, 349.

We conclude that we have here established a "new rule." Based upon the foregoing authorities, we conclude that our decision is applicable to all cases still subject to direct review by this Court on the date of this opinion. With regard to collateral review as compared to a direct review of cases, the United States Supreme Court has

clarified its position as to collateral review of criminal convictions, stating:

> [W]e now adopt Justice Harlan's view of retroactivity for cases on collateral review. Unless they fall within an exception to the general rule, new constitutional rules of criminal procedure will not be applicable to those cases which have become final before the new rules are announced.
>
> . . .
>
> The first exception suggested by Justice Harlan – that a new rule should be applied retroactively if it places "certain kinds of primary, private individual conduct beyond the power of the criminal-law-making authority to proscribe," . . .
>
> The second exception suggested by Justice Harlan – that a new rule should be applied retroactively if it requires the observance of "those procedures that . . . are 'implicit in the concept of ordered liberty,' " [citation omitted] – we apply with a modification. The language used by Justice Harlan in *Mackey* leaves no doubt that he meant the second exception to be reserved for watershed rules of criminal procedure[.]

Teague, 489 U.S. at 310-11. We conclude that such view of retroactivity for cases on collateral review is binding upon this Court.

We conclude that this decision does not fall within either of the two above described exceptions to the general rule of non-retroactive application to collateral

review. We therefore state this opinion will apply retroactively to those cases still subject to final decision on direct review on the date of this opinion, but will not apply retroactively to cases on collateral review after the date of this opinion.

Reversed and remanded for a new trial.

/s/ Fred J. Weber
Justice

We Concur:

/s/ J. A. Turnage
Chief Justice

/s/ Karla M. Gray

/s/ James C. Nelson
Justices

/s/ James E. Purcell
District Judge James E. Purcell

Justice James C. Nelson specially concurs.

I concur in our opinion. I write separately only because of my lingering concern that our decision will be misread as allowing an affirmative defense of voluntary intoxication in criminal cases. That is absolutely not so. This case is not about a defense. Rather, it deals with burden of proof and the fundamental obligation of the State to prove each element of a criminal charge – including the mental state element – beyond a reasonable doubt.

As a general proposition, the legislature may enact statutes that specify what defenses are and are not available to a charge of criminal conduct. In Montana, the legislature has, permissibly, determined that voluntary intoxication is not a defense to the commission of a crime and that, while voluntarily intoxicated, a person is still criminally responsible for his or her conduct. In other words, a defendant may not come before the jury and say: "I shot and killed Smith because (or while) I was drunk. You must, therefore, acquit me." To that extent, the portion of § 45-2-203, MCA, which provides that "an intoxicated condition is not a defense to any offense" was and is constitutional. That portion of the statute is not at issue in this case.

On the other hand, as pointed out in our opinion, it is always the obligation of the State to prove beyond a reasonable doubt each and every element of the crime charged, including that the defendant acted with the requisite mental state. If, in a given case, the only way that the prosecution can prove the defendant's mental state is by *prohibiting* the jury from considering the fact that the defendant was too intoxicated to form the requisite mental state, then the State effectively and impermissibly has been relieved of all or part of its burden to prove beyond a reasonable doubt an essential element of the crime charged. Under both the Montana and federal constitutions, the defendant must be allowed to come to the jury and, in effect, say: "I did not act purposely or knowingly; and the reason that I did not, is because I was too drunk to act with either of those two mental states. If you, jury, conclude that to be true – and that is solely your call based on all the evidence – then you must also

conclude that the prosecution has not proven an essential element of the crime charged beyond a reasonable doubt, and you must, therefore, acquit me."

In short, the language " . . . *and may not be taken into consideration in determining the existence of a mental state which is an element of the offense* . . . " (emphasis added) inserted in the 1987 and subsequent versions of § 45-2-203, MCA, effectively and impermissibly relieves or lessens the burden of the State to prove beyond a reasonable doubt an essential element of the offense charged – the mental state element – by statutorily precluding the jury from considering the very evidence that might convince them that the State had not proven that element.

It remains the burden of the State to prove beyond a reasonable doubt mental state *despite* the defendant being intoxicated. The statutory language at issue here eliminates or lessens that burden and is, therefore, constitutionally infirm.

Under § 45-2-203, MCA, and our decision here, a voluntarily intoxicated defendant remains criminally responsible for his conduct and his voluntarily intoxicated condition continues not to be a defense to any offense. However, the defendant's intoxicated condition may be taken into consideration by the finder of fact in determining the existence of a mental state which is an element of the offense charged.

/s/ James C. Nelson
Justice

Justice Karla M. Gray joins in the foregoing special concurrence.

/s/ Karla M. Gray
Justice

Chief Justice J. A. Turnage, specially concurring:

I respectfully specially concur, specifically to the majority opinion holding that the opinion will apply retroactively to those cases still subject to final decision on direct review on the date of this opinion but will not apply retroactively to cases on collateral review after the date of this opinion.

I further specially concur and urge the next session of the Montana legislative assembly to amend § 45-2-203, MCA, to eliminate the problem this Court finds to exist in the 1987 amended version of this statute. I would recommend that the legislature consider amending § 45-2-203, MCA, to reinstate the provisions thereof that existed in the 1985 version of this statute. Such amendment would essentially reinstate language that "[a]n intoxicated or drugged condition may be taken into consideration in determination of the existence of a mental state which is an element of the offense."

/s/ J.A. Turnage
Chief Justice

Justice Terry N. Trieweiler specially concurring in part and dissenting in part.

I concur with the majority's conclusion that the stricken portions of § 45-2-203, MCA (1993), violated Egelhoff's right to due process, and therefore, were unconstitutional. However, I do not agree with all that is said in the majority opinion.

I specifically disagree that a principle of constitutional law can be made applicable to some citizens and not others.

In my view, the role of this Court is to interpret the Constitution and apply it to the parties before it. Whether the parties come before this Court by direct appeal, or by statutorily authorized collateral review, is irrelevant. The protections afforded by the Constitution apply to everyone. It makes no sense to have different interpretations based on the procedure by which an unconstitutionally treated person arrives in our Court.

The majority relies on *Teague v. Lane* (1989), 489 U.S. 288, 109 S. Ct. 1060, 103 L. Ed. 2d. 334, for the principle that "new" rules of constitutional law must be applied to all cases still subject to review, but only under limited circumstances to cases which are collaterally reviewed. *Teague*, and the U.S. Supreme Court's earlier decision in *Griffith v. Kentucky* (1987), 479 U.S. 314, 107 S. Ct. 708, 93 L. Ed. 2d 649, are based largely on the earlier dissent of Mr. Justice Harlan in *Mackey v. United States* (1971), 401 U.S. 667, 91 S. Ct. 1160, 28 L. Ed. 2d. 404. In *Mackey*, the majority of the U.S. Supreme Court refused to apply two of its decisions interpreting the Fifth Amendment right against compulsory self-incrimination to other cases

which were pending on direct appeal at the time those cases were decided. In dissent, Justice Harlan pointed out that selectively applying the Constitution to people who are similarly situated based merely on the circumstances or timing of their appearance in court is the antithesis of the judiciary's responsibility. Since his observations are equally applicable to the distinction made between those defendants who appear by direct appeal and those who appear by collateral review, they are worth repeating.

> We announce new constitutional rules, then, only as a correlative of our dual duty to decide those cases over which we have jurisdiction and to apply the Federal Constitution as one source of the matrix of governing legal rules. We cannot release criminals from jail merely because we think one case is a particularly appropriate one in which to apply what reads like a general rule of law or in order to avoid making new legal norms through promulgation of dicta. This serious interference with the corrective process is justified only by necessity, as part of our task of applying the Constitution to cases before us. Simply fishing one case from the stream of appellate review, using it as a vehicle for pronouncing new constitutional standards, and then permitting a stream of similar cases subsequently to flow by unaffected by that new rule constitute an indefensible departure from this model of judicial review.

. . . In truth, the Court's assertion of power to disregard current law in adjudicating cases before us that have not already run the full course of appellate review, is quite simply an assertion that our constitutional function is not one of adjudication but in effect of legislation.

We apply and definitively interpret the Constitution, under this view of our role, not because we are bound to, but only because we occasionally deem it appropriate, useful, or wise. That sort of choice may permissibly be made by a legislature or a council of revision, but not by a court of law.

. . . .

. . . I continue to believe that a proper perception of our duties as a court of law, charged with applying the Constitution to resolve every legal dispute within our jurisdiction on direct review, mandates that we apply the law as it is at the time, not as it once was. Inquiry into the nature, purposes, and scope of a particular constitutional rule is essential to the task of deciding whether that rule should be made the law of the land. That inquiry is, however, quite simply irrelevant in deciding, once a rule has been adopted as part of our legal fabric, which cases then pending in this Court should be governed by it.

Mackey, 401 U.S. at 678-81, 28 L. Ed. 2d at 412-14 (Harlan, J., dissenting).

While Justice Harlan was unwilling to apply the same logic to those cases reviewed by a petition for a federal writ of habeas corpus, I can see no reason for making such a distinction under state law. The bases by which criminal convictions can be collaterally reviewed in Montana are very limited. *See* § 46-22-101, MCA (habeas corpus), and § 46-21-105(2), MCA (limitations on post-conviction relief). Furthermore, no criminal conviction can be reversed under Montana law, even if constitutional rights were violated, where the constitutional

infraction did not contribute to the defendant's conviction. Section 46-20-104, MCA.

The effect of the majority's limitation on the application of their decision, then, is to hold that even in those cases where people have been convicted and jailed in violation of their right to due process, and even where that violation is raised properly by collateral review, we will not consider the constitutional infraction simply because it is brought to our attention by collateral review, rather than direct appeal.

This dichotomy is irrational and offends the very traditions of fairness and due process which we, as a judicial body, are charged to enforce.

For these reasons, while I concur with the result arrived at in this case, I dissent from that part of the majority opinion which would selectively apply the constitution of this State, or of the United States, based upon the procedure by which offensive governmental conduct is brought to our attention.

/s/ Terry N. Trieweiler
Justice

Justice William E. Hunt, Sr., joins in the foregoing concurring and dissenting opinion.

/s/ William E. Hunt, Sr.
Justice

INSTRUCTION NO. 7

An Information has been filed charging the defendant, JAMES ALLEN EGELHOFF, with the offenses of **DELIBERATE HOMICIDE, two counts,** alleged to have been committed in Lincoln County, State of Montana, on or about July 12, 1992, or the early morning hours of July 13, 1992. The defendant has pled not guilty. The jury's task in this case is to decide whether the defendant is guilty or not guilty based upon the evidence and the law as stated in my instructions. These are some of the rules of law that you must follow:

1. The filing of an Information against this Defendant is simply a part of the legal process to bring this case into Court for trial and notifying the Defendant of the charge against him. Neither the Information nor the charge contained therein is to be taken by you as any indication, evidence or proof that he is guilty of any offense.

2. By his plea of not guilty, the Defendant denies every allegation of the charges against him.

3. The State of Montana has the burden of proving the guilt of the Defendant beyond a reasonable doubt.

4. Proof beyond a reasonable doubt is proof of such a convincing character that a reasonable person would rely and act upon it in the most important of his own affairs. Beyond a reasonable doubt does not mean beyond any doubt or beyond a shadow of a doubt.

5. The Defendant is presumed to be innocent of the charge against him. This presumption remains with him

throughout every stage of the trial and during your deliberations on the verdict. It is not overcome unless from all the evidence in the case you are convinced beyond a reasonable doubt that the Defendant is guilty. The Defendant is not required to prove his innocence.

GIVEN: /s/ Robert S. Keller
District Judge

INSTRUCTION NO. 8

A person commits the offense of deliberate homicide if he purposely or knowingly causes the death of another human being.

GIVEN: /s/ Robert S. Keller
District Judge

INSTRUCTION NO. 9

A person acts purposely when it is his conscious object to engage in conduct of that nature or to cause such a result.

GIVEN: /s/ Robert S. Keller
District Judge

INSTRUCTION NO. 10

A person acts knowingly when he is aware of his conduct or when he is aware under the circumstances his conduct constitutes a crime; or, when he is aware there exists the high probability that his conduct will cause a specific result.

GIVEN: /s/ Robert S. Keller
District Judge

INSTRUCTION NO. 11

A person who is in an intoxicated condition is criminally responsible for his conduct and an intoxicated condition is not a defense to any offense and may not be taken into consideration in determining the existence of a mental state which is an element of the offense unless the Defendant proves that he did not know that it was an intoxicating substance when he consumed the substance causing the condition.

GIVEN: /s/ Robert S. Keller
District Judge

INSTRUCTION NO. 13

To convict the defendant of deliberate homicide, Count I, the State must prove the following elements beyond a reasonable doubt:

1. That the defendant caused the death of John Darrell Christenson, a human being; and

3 [sic]. That the defendant acted purposely or knowingly.

GIVEN: /s/ Robert S. Keller
District Judge

INSTRUCTION NO. 14

To convict the defendant of deliberate homicide, Count II, the State must prove the following elements beyond a reasonable doubt:

1. That the defendant caused the death of Roberta Jean Pavola, a human being; and

3 [sic]. That the defendant acted purposely or knowingly.

GIVEN: /s/ Robert S. Keller
District Judge